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No. 95-1511

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOHN L. KEMMERER and
JAMES L. JORDAN,

Petitioners,

v.

ICI AMERICAS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Theodore R. Mann
Counsel of Record
Carol J. Sulcoski
MANN, UNGAR, SPECTOR & LABOVITZ, P.C.
1709 Spruce Street
Philadelphia, PA 19103
(215) 732-3120
Attorneys for Petitioners John L. Kemmerer and James H. Jordan

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PACKARD PRESS® / APPELLATE DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Petition for Writ of *Certiorari* ("Petition") raises the question whether Congress' expressed intent that deferred compensation plans be enforceable under ERISA was undermined by a decision holding, *inter alia,* that (1) the unpredictability of future tax rates, and (2) the possibility that the promised deferred payments may never be made, each render damages too speculative to be recoverable. ICI, in its Brief in Opposition, does not mention ERISA or even refer to the clash between the decision and the intent of Congress. It responds, instead, that the decision was "a well-reasoned, fact-bound determination" (Brief in Opposition at 7), a "fact-bound review" which upheld the District Court's "fact-specific determinations" (*id.* at 4, 5); that petitioners have "transform(ed) an isolated statement into a split of authority between the Circuits" *(id.* at 7); and that those "two narrow legal holdings" were not the real basis for the Court of Appeal's conclusion *(id.* at 4, 7). (Emphasis added)

We refer this Court to the Court of Appeals Opinion (App. 2a, 14a-15a), which speaks for itself. This was not a "fact-bound determination"; indeed the heart of the appeal to the Court of Appeals was that the District Court violated Fed.R.Civ.P. 52(b) in failing to make findings of fact. This and other errors below were not regarded as appropriate reasons for *certiorari* (see Petition at n. 3). But the two issues that have been raised were holdings with obvious implications that go far beyond the facts of this case, and the first of those two holdings is squarely at odds with the Seventh Circuit's decision in *Oddi v. Ayco Corp.,* 947 F.2d 257 (7th Cir. 1992).

Regarding the second holding, the Petition notes (at 4, 9) that neither the trial judge, nor the Court of Appeals, nor ICI cited any authority to support the inclusion of a "risk premium" factor in a damage award, whether under ERISA or otherwise. ICI's response (Brief in Opposition at 10) is that petitioners likewise have not cited cases suggesting "that market value is an inappropriate measure in conducting a valuation of this nature", citing Justice Frankfurter's decision in *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949), for

the proposition that risk is taken into account in determining an appropriate capitalization rate to use in valuing assets.

This is not an eminent domain case. ICI is trying to inject into the emerging ERISA common law, damage principles used to determine the value of a business or real estate when a condemnor is required to pay the property owner the amount a third party purchaser would have paid him in an uncoerced negotiation. But in determining damages in this breach of contract case, we are not "conducting an evaluation." A promisor has broken a promise to allow the promisee to have the benefits of tax deferral by deferring his compensation to a later date. The value of the promise that was broken is the after-tax dollar difference between (a) the present value of the amounts that were to have been paid later and (b) the amount prematurely paid. Doubtless were a third party purchasing a retiree's rights to those promised future payments such a purchaser, in determining value, would take into account the risk that the employer might not be able to make them. To such a purchaser the employer's credit rating would be relevant. But it does not follow, as ICI suggests, that the employer itself, the breaching promisor, should be entitled to a reduction in damages because of its own poor credit.[1] Such an absurdity should not be permitted to become one of the

1. Even more disturbing, that claim is being made by the current executives who, at the same time that they terminated the plan for the retired executives, created a new tax-deferred plan for themselves with no apparent concern that ICI might not be able to make the payments in the future. (Petition at 3).

principles of the developing federal ERISA common law. *Kimball Laundry, supra,* has no application to this case whatever; the applicable principles regarding risk are those stated in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 537, 103 S. Ct. 2541, 2550 (1983) and the other authorities cited at page 9, note 9 of the Petition.

Respectfully submitted,

Theodore R. Mann
Counsel of Record
Carol J. Sulcoski
MANN, UNGAR, SPECTOR & LABOVITZ, P.C.
1709 Spruce Street
Philadelphia, PA 19103
(215) 732-3120
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